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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, ET AL, *Petitioners*

v.

ROGER W. HUDSON, ET AL, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND REGULATION	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	12
ARGUMENT	
I. The Real Right in Issue	14
II. The Duty of the School Board	16
III. The Overbreadth Attack on the Policy Must Fail	17
IV. During the Transition Period From a Dual to a Unitary School System, a School Board, Acting Under a Court Ordered Duty to Eliminate All Vestiges of Racial Discrimination "Root and Branch" From its System, May Constitutionally and Justifiably Burden Teachers Associational Rights Involving Conduct with "Segregation" Overtones Due to Pressing Public Necessity	24
V. The School Board's Regulation and Action Thereunder is Not a Denial of Petitioners' Right to Send Their Children to the Calhoun Academy. The Constitution Does Not Confer Upon the Petitioners the Right to Demand Re-employment in the Calhoun County Public Schools, as it Results in the Denial of Equal Protection of the Laws to the Public School Children of Calhoun County	26

Page

VI. *Pickering* Provides No Guideline Due to the Circumstances of this Case; However, to the Extent that *Pickering* Infringes Upon the Affirmative Duty of a School Board to Eliminate Racial Discrimination Root and Branch From its Public Schools, it Should be Overruled or at Least Distinguished and Made Inapplicable During the Transition Period From a Dual to a Unitary System 29

VII. The Elimination of All Vestiges of Racial Discrimination From the Public Schools is an Overriding Vital Government Interest and Reasonably Permits the Burdening of Petitioners' Rights 33

CONCLUSION 38

AUTHORITIES CITED

CASES:

Adler v. *Board of Education*, 342 U.S. 485 (1952) ... 34
Arnett v. *Kennedy*, 416 U.S. 134 (1974) 23
Augustus v. *School Board of Escambia County*, 507 F. 2d 152 (5th Cir. 1975) 13, 25, 26
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 12, 20, 21
Brown v. *Board of Education*, 347 U.S. 483 (1954) .. 3, 12, 13, 15, 24, 28, 31, 37
Burnside v. *Byars*, 363 F. 2d 744 (5th Cir. 1966) 31
Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) 21, 22, 23, 35
Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 21, 22, 23
Elrod v. *Burns*, 44 U.S.L.W. 5091 (June 28, 1976) .. 13, 33, 34, 35
Fifth Avenue Peach Parade Comm. v. *Gray*, 480 F. 2d 326 (2nd Cir. 1973) 21

Page

Freeman v. *Flake*, 448 F. 2d 528 (10th Cir. 1971) cert. denied 405 U.S. 1032 (1972) 31
Gisner v. *Stanford Board of Education*, 440 F. 2d 803 (2nd Cir. 1971) 23
Green v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971) .. 4, 31
Green v. *County School Board*, 391 U.S. 430 (1968) .. 3, 7, 12, 13, 15, 16, 24, 28, 29, 30, 31, 36
Grenede v. *Board of Supervisors of Elections*, 341 U.S. 56 (1951) 19
Harrison v. *N.A.A.C.P.*, 360 U.S. 167 (1959) 19, 22
Healy v. *James*, 408 U.S. 169 (1972) 30
Horton v. *U. S. Steel Corp.*, 286 F. 2d 210 (5th Cir. 1961) 37
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) .. 2
Keckeisen v. *Independent School District*, 509 F. 2d 1062 (8th Cir. 1975), cert. denied 44 U.S.L.W. 3719 (1976) 13, 27
Keyishian v. *Board of Regents*. 385 U.S. 589 (1967) 20, 34
Korematsu v. *United States*, 323 U.S. 214 (1944) ... 13, 24
Laird v. *Tatum*, 408 U.S. 1 (1972) 21
Lecci v. *Cahn*, 493 F. 2d 826 (2nd Cir. 1974) 20
Lee v. *Macon County Board of Education*, 483 F. 2d 242 (5th Cir. 1973) 25
McDaniel v. *Barresi*, 402 U.S. 39 (1972) 7, 12, 15, 16, 24, 30. 31, 36
Miller v. *School District Number 167, Cook County, Illinois*, 495 F. 2d 658 (7th Cir. 1974) rehearing denied 500 F. 2d 711 (1974) 35, 36
Murry v. *West Baton Rouge Parish School Board*, 472 F. 2d 438 (5th Cir. 1973) 23
Norwood v. *Harrison*, 413 U.S. 455 (1973) 4. 14, 28
Picken v. *Okolona Municipal Separate School District*. 380 F. Supp. 1036 (N.D. Miss. 1974) aff'd 527 F. 2d 358 (5th Cir. 1976) 25
Pickering v. *Board of Education*, 391 U.S. 563 (1968) 13, 14, 30, 31, 32, 34, 36, 37

Page

Rice v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955) 2
Runyon v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976) 2, 4, 12, 14, 15, 16, 30, 32
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 27
Singleton v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1970) 25
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 12, 16, 31, 35
Swann v. *Charlotte-Mecklenburg Board of Education*, 362 F. Supp. 1223 (W.D. N.C. 1973) 29
Thompson v. *Madison County Board of Education*, 476 F. 2d 676 (5th Cir. 1973) 25
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 30, 31, 33, 34
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 20
United States v. *Calhoun County Board of Education*, No. WC 66-37, Order of August 8, 1968 (N.D. Miss. 1968) 15
United States v. *Raines*, 362 U.S. 17 (1950) 20
United States v. *U. S. Gypsum Co.*, 333 U.S. 364 (1947) 37
Young v. *American Mini Theatres, Inc.*, 44 U.S.L.W. 4999 (June 24, 1976) 20
Waugh v. *Mississippi University*, 237 U.S. 589 (1915) 33

STATUTES:

United States Statutes
42 U.S.C. Section 1981 15
Mississippi Statutes
Mississippi Code of 1972, Annotated,
Section 37-9-59 ..... 11, 12, 18, 19, 24
Federal Rules
Federal Rules of Civil Procedure,
Rule 52(a) 37

Page

SECONDARY AUTHORITY:

Black, "Lawfulness of the Segregation Decisions", 69 Yale L.J. 421 (1960) 16
Directory of Health, Education & Welfare Services, Northeast Mississippi 4
Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844 (1970) 20
Read, "Judicial Evolution of the Law of School Integration Since *Brown* v. *Board of Education*," 39 Law and Contemporary Problems 7 (1975) ... 3

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855 (Pet. A. 30a).[1] The opinion of the Court of Appeals for the Fifth Circuit is reported at 511 F. 2d 744 (Pet. A. 2a). The denial of rehearing en banc by the Court of Appeals is reported at 515 F. 2d 762 (Pet. A. 1a).

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[1] References to the Appendix contained in the Petition for Certiorari are cited at "Pet. A. ——". References to the General Appendix are cited at "A. ——".

JURISDICTION

The jurisdiction requisites are adequately set forth in the Brief for Petitioners.[2]

CONSTITUTIONAL PROVISIONS AND REGULATION

UNITED STATES CONSTITUTION—FIRST AMENDMENT: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

UNITED STATES CONSTITUTION—14TH AMENDMENT: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

POLICY—CALHOUN COUNTY BOARD OF EDUCATION: (P)rior to the employment of a new teacher or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed.[3]

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[2] Amicus Curiae National Education Association ("NEA"), has suggested that the Writ of Certiorari should be dismissed as having been improvidently granted, relying upon *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (June 25, 1976), and *Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70 (1955). The "NEA's" position in this regard has some merit. Also see dissenting opinion of Mr. Justice Harlan in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 at 477-80 1968).

[3] Petitioners in the Constitutional Provisions and Policy portion of their Briefs have misstated the policy as it was stipulated.

QUESTION PRESENTED

Whether, consistent with the First Amendment, a rural southern school board, acting pursuant to a Court ordered Fourteenth Amendment legal and affirmative duty to eliminate racial discrimination "root and branch" from its school system, may elect not to reemploy classroom teachers who send their own children to a racially discriminatory, segregated, all-white, secular academy.

STATEMENT OF THE CASE

In 1954, this Court rendered its historic decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) holding that segregated education in the public schools was inherently unequal for Black children. For almost fifteen years thereafter, there was virtually a total lack of conformity on the part of local school boards, particularly in the South, to the mandate of that decision.[4] Subsequently, in the late 1960's, this Court in *Green* v. *County School Board*, 391 U.S. 430 (1968), decreed that integration of the public schools could no longer be delayed, and charged school authorities with "the affirmative duty to take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437-38 (emphasis added). On August 9, 1968,

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(For the stipulation of the policy see A. 9 and 10). In addition, see footnote 14 infra. In the District Court, the Court of Appeals and in the Petition for Writ of Certiorari, Petitioners set forth the policy as stipulated and as contained above, not as now set forth in their Brief.

[4] For a history of the resistance to school desegregation in the South after *Brown*, see Read, "Judicial Evolution of the Law of School Integration Since *Brown* v. *Board of Education*". 39 Law and Contemporary Problems 7 (1975).

the United States District Court for the Northern District of Mississippi, directed the school authorities of the Calhoun County [5] school system to immediately desegregate that school system. (A. 383) Only twenty days after the desegregation order was entered by the District Court, the Calhoun Education Foundation Corporation was established for the purpose of operating a racially discriminatory all-white private academy, the Calhoun Academy.[6] (Pet. A. 31a; A. 72, 207-10, 259, 393 Respondent's Exhibit No. 6) After the Academy was established and began operating, some

[5] Calhoun County, Mississippi, is a small rural southern county. Its total population in 1970 was 14,623; 10,807 of which were white and 3,816 non-white. The per capita income in 1969 was $1,840.00 [Directory of Health, Education & Welfare Services, Northeast Mississippi, at 78, compiled by Memphis Regional Medical Program, under U.S. Department of Health, Education and Welfare Public Health Service Grant 5 603 RM-00051-05 A3 (1973)]

[6] The Calhoun Academy, along with other Mississippi private academies, lost its tax exempt status with Internal Revenue Service as a result of the decision of the United States District Court for the District of Columbia in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971). The Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, presently does not have tax exempt status under Section 501(c)(3) of the Internal Revenue Code as a result of their failure to adopt racially non-discriminatory admissions policies. In addition, the Calhoun Educational Foundation Corporation, d/b/a Calhoun Academy, has not qualified to receive free textbooks from the State of Mississippi pursuant to *Norwood* v. *Harrison*, 413 U.S. 455 (1973). Also, substantial financial support to the Calhoun Academy is received from the Calhoun County Citizens Counsel (A. 259-61; A. 404-17, Respondent's Exhibit No. 7; A. 218-23; A. 328-35, Respondent's Exhibit No. 1) (Also, see Opinion of District Court 365 F. Supp. 855 at 857, n. 1). Irregardless of this Court's holding in *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (U.S. June 25, 1976), the Calhoun Academy, in this Brief, will be treated as a racially-discriminatory academy, since at the time the policy was adopted (November 1972), and Petitioners were not reemployed, that, in fact, is what it was.

of the teachers in the Calhoun County public school system enrolled and sent their own children to the Academy, causing controversy [7] among parents, teachers and students in the public school system. (A. 200-03, 211-12, 216-17) After considering the matter for some time, in November 1972, the school board adopted an oral policy which was never reduced to writing, as follows:

> (P)rior to the employment of a new teacher or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County or said teacher would not be employed or reemployed. (A. 9)

The sole impetus for adoption of the policy was the racially discriminatory Calhoun Academy. (A. 189-90, 214-15) There were and are no religious private schools in Calhoun County. (A. 28, 189, 215) In fact, the *only* private school that has ever been in Calhoun County, was the racially discriminatory Calhoun Academy. (A. 28, 215) John Burt, the Superintendent of the Calhoun County public schools, stated that he had recommended the policy "in order to comply with the court order and to carry out the job of running the best schools . . . possible . . . in Calhoun County". (A. 141) Stating that in his own opinion that the fact that a teacher had a child in a private school would affect the per-

[7] The controversial climate existing in Calhoun County between the private school patrons and public school supporters can perhaps best be exemplified by the degree of division among families which occurred, even pitting brother against brother. Respondent Mallory, President of the school board, testified that his own brother sent his children to the Calhoun Academy and told him that "he didn't want his kids going to school with them niggers". (A. 201-202).

formance and efficiency of that teacher, expressed his concern that at the time the school system "needed total cooperation and dedication from all people concerned with the public school system." (A. 141) Respondent Hudson, the Principal of the Calhoun City Attendance Center, testified in response as to why the policy was adopted:

> Because we felt that the—in order to carry out the regulations of this Court in regard to the court order that we are operating under, we are directed to do everything that we can to promote the unitary system and to make it work to the best benefit of all people. And we feel that if a teacher had divided loyalties that her efficiency, productivity, is not going to—is definitely going to be affected (A. 27)

Paul M. Moore, the regular attorney for the Calhoun County Board of Education, testified that he had written to the United States Justice Department concerning the policy prior to its adoption. (A. 179-81, 391-92 Respondent's Exhibit No. 5) In the letter, Mr. Moore stated:

> The situation is that we have learned since entering into contracts with certain of the teachers in the School District, that they have children that they are sending to private schools. We have advised them that they cannot expect us to renew their contracts with them when they come up for renewal, which is normally in March, 1973. We have created quite a heated controversy in the community by so doing. All of the teachers, of course, are white. We are not absolutely positive at this point, but our best information is that there are nine children involved.
>
> I advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their action was correct. The board also feels that our faculty members should be dedicated to the public school program, and also that their sending their children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children. (A. 392)

The Justice Department in response to this correspondence from the school board attorney, while specifically reserving comment on any due process or First Amendment issues which might be raised with respect to the policy (A. 402-3) and referring to the board's "affirmative duty" under *McDaniel* v. *Barresi,* 402 U.S. 39 (1972) and *Green* v. *County School Board,* 391 U.S. 430 (1968), advised that the Court orders under which the board was operating would not preclude the school board from the contemplated action. (A. 402-403)

After the response of the Justice Department was received, the policy was adopted by the school board in November, 1972, in an effort to comply with their affirmative duty to eliminate racial discrimination "root and branch" from the Calhoun County public schools. Other factors contributing to the adoption of the policy stemmed from the desire to assure the complete and total support, loyalty and dedication of the teachers and system personnel, in the difficult and trying times during the effort to establish a desegregated school system in Calhoun County and to further the best interest of the children in the school system by maintaining teacher effectiveness and performance. (A. 27, 141, 164, 211, 215, 391 Respondent's Exhibit No. 6)

Respondent R. W. Mallory, the President of the

Calhoun County Board of Education, testified as to the basis and intent in forming and adopting the policy that:

> Well, . . . we didn't think that a teacher that had kids we'll say in this . . . (Calhoun Academy) . . . would be dedicated to the public school system. A. 199-200.
>
> * * *
>
> These people that have kids in the private schools, especially at the time of the organization, were hard prejudiced against the public schools. Now, that was evident, you know, anywhere. Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought. That's our thinking on it. (A. 201)
>
> * * *
>
> There has got to be just a little friction you might say, or animosity between some of these people, you know, that teach at these—that have kids in the private school and public schools . . .
>
> Was that expressed to you in your community by people?
>
> Yes, sir. Now, this—now, we discussed this policy for maybe two or three years before we ever done anything about it. (A. 211)

With respect to the private school to which the policy was directed, Respondent Mallory testified:

> THE COURT:
> All right. Would it mean any private school? Is that what you understand the policy to be?
>
> THE WITNESS:
> Of course, we was just concerned——
>
> THE COURT:
> What school were you talking about?

> THE WITNESS:
> We were concerned with Calhoun Academy because that's the school that's in the county, the only one.
>
> THE COURT:
> Was any other private school ever in consideration?
>
> THE WITNESS:
> There was no other one discussed. No other one involved.
>
> (A. 189-90)
>
> * * *
>
> THE COURT:
> Did your policy expressly apply only to Calhoun Academy?
>
> THE WITNESS:
> No, sir, I mean, it didn't say so in the policy. But, of course——
>
> THE COURT:
> What was the intent?
>
> THE WITNESS:
> Well, that was the intent, because that was the only school involved, you know.
>
> THE COURT:
> That was the only private school in the County?
>
> THE WITNESS:
> Yes sir, only other school. (A. 214-15)

Mallory also testified that the school board, in adopting the policy, also considered the support given to the Academy by the Citizens Counsel and the publicity this support received throughout Calhoun County. (A. 218-219, see Collective Defendants Exhibit 1, A. 328-335; Exhibit 7, A. 404-417)

Two educational psychologists testified, uncontradicted, that the school board's action was reasonably and significantly related to the job performance and effectiveness of a classroom teacher. It was their opinion that the action on the part of the school board was imperative if the best interests of the Calhoun County public school children were to be served. These psychologists stated that the children in the classes of a teacher sending his own child to a racially discriminatory, all-white, private school, would perceive the teacher was rejecting them and derive a sense and feeling of inferiority. A general negative educational atmosphere prevails. The expectations of the teacher of the performance of the public school children would necessarily be lower, and as a result, these children would not achieve their highest educational level. Accordingly, the classroom effectiveness and performance of the teacher is affected. (A. 99-105; 117-27; 174-75)

The Petitioners themselves, while espousing various reasons for sending their children to the Academy, were revealed to be much more than just "passive" supporters of the Academy. Petitioner Wright, for example, while admitting she was not dedicated to the concept of desegregated school systems (A. 95), was a member of the "patrons" (mothers organization) and a "homeroom mother" of the Academy and actively participated in raising funds for the Academy during the time which she was teaching in the Calhoun County public school. (A. 91) Mrs. Wright spent substantial time and energy involved in the work and activities of the Academy and expressed a feeling of responsibility to the Academy. (A. 91) She placed her son in the Academy immediately after the first year of full integration of the Calhoun County public schools (A. 89) and her daughter has never attended the public schools,

only the Academy. (A. 95) Petitioner Adams stated that she had sent her child to the Academy because of a speech problem.[8] (A. 41) However, the Calhoun Academy had no speech therapist (A. 47) while the Calhoun County public schools had several, and the therapist at the Calhoun City Attendance Center where Petitioner taught, and her child would have attended, was black. (A. 142-143) Mrs. Adams' husband taught at the Grenada Lake Academy, a private school in adjoining Grenada County. (A. 41) Petitioner Cook, after not being rehired by the public schools, immediately became the Headmaster (Principal) of the Calhoun Academy.[9] (A. 72)

Prior to the end of the 1972-1973 school year, the Petitioners, Billy D. Book, Loula Juanita Adams, and Mrs. W. P. Wright, were advised that if their children were enrolled in the racially discriminatory Calhoun Academy for the coming school year, they would not be reemployed by the school board. Accordingly, the Petitioners were not rehired for the 1973-1974 school year.[10]

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[8] Petitioner Adams did not advise the public school officials that her child had a special problem after being informed that she would not be reemployed. (A. 60).

[9] Petitioner Cook gave as his reason for sending his child to the Academy that he preferred not to have his child on the same campus with him. (A. 62-63). His child presently attends school on the same campus where he works, the Calhoun Academy. (A. 75-76; 82-83).

[10] None of the Petitioners have made applications for employment in the Calhoun County public schools since the adoption in 1974 of Section 37-9-59 of the Mississippi Code of 1972, nor did they request re-instatement pending appeal.

SUMMARY OF ARGUMENT

Although Petitioners have a right to send their children to educational institutions that promote a belief in racial segregation, they have no right of "non-association" with black children in the educational environment. *Runyon* v. *McCrary*, 44 U.S.L.W. 5034 (U.S. June 25, 1976) The real right at issue in this case is the right of black children to equal educational opportunity free of racially discriminatory overtones. *Brown* v. *Board of Education*, 347 U.S. 483 (1954)

The Respondent school board acted pursuant to an affirmative duty, required by the Fourteenth Amendment, to take whatever steps were necessary to eliminate all vestiges of racial discrimination "root and branch" from the school system under their charge. *Green* v. *County School Board*, 391 U.S. 430 (1968); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)

Petitioners' overbreadth attack on the school board's policy must fail. Subsequent to the decision of the District Court, Mississippi enacted Section 37-9-59 of the Mississippi Code of 1972 prohibiting school districts from denying employment or reemployment to teachers because that teacher's child does not attend the school system in which he is employed. This statute's existence forecloses the board's policy from having a "chilling effect" on anyone.

Because of this absence of a "deterrent effect" of the policy on other persons, and a readily apparent construction of the policy limiting it's application to the Calhoun Academy, the only private school in Calhoun County, it withstands the overbreadth attack. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

Public necessity justifies the restriction of Petitioners' association rights and conduct because of their "segregation overtones," when *limited to the transitional period* necessary to accomplish school desegregation. During this period of time, a school board may constitutionally burden associational rights to guarantee the accomplishment of a Fourteenth Amendment mandated school system free of all vestiges of racial discrimination. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Brown* v. *Board of Education, supra; Augustus* v. *School Board of Escambia County*, 507 F. 2d 152 (5th Cir. 1975)

The regulation does not deny Petitioners the right to send their children to the Calhoun Academy, it only prohibits their employment if they do. *Keckeisen* v. *Independent School District*, 507 F. 2d 1062 (8th Cir. 1975) cert. denied 44 U.S.L.W. 3719 (1976). The Constitution does not confer upon Petitioners the right to reemployment in the Calhoun County public schools because of the resulting denial of the Fourteenth Amendment right of public school children to an equal educational opportunity. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) The Petitioners, by their conduct, communicated to public school children and the general public the label that the public schools were "inferior". *Green* v. *County School Board*, 391 U.S. 430 (1968) required the school authorities to correct this discriminatory situation.

The absence of a school desegregation order definitively distinguishes *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and *Elrod* v. *Burns*, 44 U.S.L.W. 5091 (June 28, 1976) from this action so that their guidelines are not readily applicable. In any event, the concern of the school board in eliminating all vestiges

of racial discrimination from the schools in their charge is a vital and compelling interest, requiring, under any balancing of interest test, the scales to tip in favor of its action. The policy constitutes a reasonable restraint upon Petitioners' associational rights.

Finally, because of the school board's overriding interests, to the extent that *Pickering's* guidelines would allow a situation to develop which would thwart or infringe upon the implementation of an outstanding school desegregation order, it should be overruled or at least made inapplicable during the transition period necessarily attendant to school desegregation.

ARGUMENT

I.

The Real Right in Issue

Petitioners, relying upon *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S. June 25, 1976), assert that the right in issue before the Court involves these three teachers' "basis, fundamental right to send his or her child to any school of his own choosing without interference from the state." (Petitioners' Brief 22) In *Runyon,* this Court recognized that:

> . . . it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood* v. *Harrison,* 413 U.S. 455, "the Constitution . . . places no value on discrimination." *id.,* at 469, and while "(i)nvidious *private discrimination* may be characterized as a form of expressing freedom of association protected by the First Amendment . . . *it has never been afforded affirmative constitutional protections.* (44 U.S. L.W. at 5039, emphasis added)

The *real* right [11] in issue before this Court is the right of black school children attending the public schools of Calhoun County to the full equal educational opportunity [12] promised in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and reaffirmed in *Green* v. *County School Board,* 391 U.S. 430 (1968); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971) and by the District Court's Order of August 8, 1968 in *United States* v. *Calhoun County Board of Education,* No. WC 66-37 (N.D. Miss. 1968). Surely, if Petitioners have a right of sending their children to educational institutions promoting belief in racial discrimination, these black chldren have a right to attend public schools free of the pervasive influences of the lingering remnants of racial discrimination. It is the rights of these public school children that is the real right in issue before this Court.

In addition, by virtue of *Runyon's* holding that 42 U.S.C. Section 1981 prohibits private, commercially operated, non-sectarian schools from denying admis-

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[11] If it is true, as recognized in *Runyon,* that the Private School Association had standing to assert the rights of its member schools' patrons (44 U.S.L.W. at 5039, footnote 13), then correspondingly, Respondents here have standing to assert the rights of the children, both black and white, in attendance at the Calhoun County public schools under *Brown I* and its progeny.

[12] It should be beyond question that the economic status of the vast majority of blacks in Mississippi, particularly Calhoun County, prohibits their entrance in any schools other than public schools. (See footnote 5 supra) In this regard, *Runyon,* has no practical effect whatsoever on black school children in the rural South.

sion to prospective students because they are black, it logically follows that Petitioners, and their children, have no right of "non-association" with black children in such private schools. Since private, commercially operated, non-sectarian schools, such as Calhoun Academy, after *Runyon,*[13] cannot discriminate only on the basis of race, Petitioners have (or had) no right to send their children to such a school, i.e., one which discriminates on the basis of race. It has been observed that "(w)e have to associate with anybody who has the right to be there. The question of our right not to associate with (someone) is concluded when we decide whether he has a right to be there." Black, "Lawfulness of the Segregation Decisions", 69 Yale L.J. 421 (1960).

II.

The Duty of the School Board

At the time the policy was adopted and the Petitioners were not rehired, the Respondent school authorities were charged with the continuing affirmative duty to take whatever steps might be necessary to eliminate from the public schools all vestiges of racial discrimination root and branch. *Green* v. *County School Board,* 391 U.S. 430, 437-38 (1968); *McDaniel* v. *Barresi,* 402 U.S. 38, 41 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971). Indeed, this Court observed in *Swann*:

[13] It should be remembered that at the time the policy herein under attack was adopted, and the action of the school board with respect to the Petitioners was taken, the Calhoun Academy was a racially discriminatory, all-white academy, established in the wake of public school desegregation to provide a haven for "white flight." District Court Opinion, 365 F. Supp. at 857 (N.D. Miss. 1973).

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. * * * (S)chool authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'.
>
> * * *
>
> If school authorities fail in their affirmative obligations . . . judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Id.,* at 15.

The school board, mindful of this duty, and acting thereunder, undertook the questioned action against the Petitioners. (A. 27, 141, 179-81, 391-92)

III.

The Overbreadth Attack on the Policy Must Fail

Petitioners assert that the policy in question is overbroad both as written[14] and as applied. Although "as

[14] It should be noted that the arguments of Petitioners in their Brief are not directed to the policy as stipulated. The school board's policy was an oral policy, not reduced to writing either before or after adoption. (A. 9) The policy was stipulated by counsel for Petitioners and counsel for the school officials as follows:

> THE COURT:
> Well, can we agree on the verbiage of the regulation? Can counsel do that and state it into the record?
>
> MR. FARESE:
> Quote, a policy was formulated wherein 'prior to the employment of a new teacher or the reemployment of an existing teacher the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend

applied" to the three petitioning teachers, the policy reaches not only the "hard core" activity it sought to curb, but the *only* activity it was intended to circumscribe, (A. 189-90, 214-15) the contention of the Petitioners is that "as written" and "as applied," the policy has a "real, substantial, chilling effect" on other teachers in the system who may elect not to utilize the Calhoun County public school system for the education of their children, i.e. other racially nondiscriminatory private schools.[15] Petitioners attempt to rest upon the principle that even though their own conduct is "hard core" within the intent of the policy, they allege "standing" to attack the policy for what they contend is its "chilling effect" on other teachers in the Calhoun County public school system. The overbreadth attack on the policy must fail.

The overbreadth doctrine is not applicable to this case in its present posture before this Court. Subsequent to the decision of the District Court below, Mississippi enacted into law what is now Section 37-9-59

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the public schools of said Calhoun County or said teacher would not be employed or reemployed'.

THE COURT:
Is that——

MR. HICKMAN:
That is the policy.

THE COURT:
You agree on the words of the policy?

MR. HICKMAN:
I agree on the words. (A. 9, 10) (Also see A. 32).

[15] It cannot be disputed that there are or were any such "other" racially-nondiscriminatory private schools in Calhoun County.

of the Mississippi Code of 1972, Annotated, as amended, which provides:

> The governing authorities of every school district in this state are hereby prohibited from denying employment or reemployment to any person as a superintendent, principal or teacher . . . or as a noninstructional personnel . . . for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, teacher, or noninstructional personnel is employed.

Because of this legislative proclamation, the policy, by which the Petitioners were denied reemployment in the Calhoun County public schools, cannot have a "chilling effect" on anyone. Because of the conspicious absence of the "chilling effect" premises, an element which is crucially vital to Petitioners argument that the policy should be struck as being overbroad, this fact alone should be dispositive of the applicability or nonapplicability of the overbreadth doctrine to the school board's regulation. This Court has accepted far lesser assurances of the absence of future chilling effect than that which is herein present. *Grenede* v. *Board of Supervisors of Elections,* 341 U.S. 56 (1951). Similarly, this Court has prefaced overbreadth scrutiny on the possibility of future restrictive interpretations and applications of a perhaps facially overbroad statute. *Harrison* v. *N.A.A.C.P.,* 360 U.S. 167, 177 (1959). If the regulations under question is susceptible to an appropriately restrictive interpretation and application, this Court has generally found that the regulation is not void for overbreadth. In the present case, not only is this criteria met, but a sweeping interpretation or application is foreclosed.

Even if the legislative enactment were not wholly dispositive of the overbreadth attack on the policy, it is an unlikely candidate for overbreadth scrutiny as it is totally outside of the traditional criteria for overbreadth voidance. Resting at the heart of the traditional principles underlying constitutional jurisprudence is the concept that one to whom a regulation may constitutionally be applied will not be granted a license to challenge the regulation on the basis that it conceivably may be unconstitutional in its application to other persons in circumstances not before the Court. *Broadrick* v. *Oklahoma,* 413 U.S. 601 at 610 (1973). The "as applied" doctrine[16] has been imposed by this Court upon itself so as to restrain the exercise of its power to pass on the constitutional validity of regulations. *United States* v. *Raines,* 362 U.S. 17, 20-21 (1950). However, as recognized in *Broadrick,* due to "weighty countervailing policies" this principle is not without exception. Petitioners maintain that they should be allowed to invoke the exception grounded in the area of First Amendment rights. *Young* v. *American Mini Theatres, Inc.,* 44 U.S.L.W. 4999 (June 24, 1976); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). Even where claimed First Amendment rights (here, association) are involved, "if the statute's deterrent effect[17] on legitimate expression is not both real and

[16] For an analysis of the "as applied" method, see Note, "The First Amendment Overbreadth Doctrine", 83 Harv. L. Rev. 844, 847-52 (1970).

[17] See *Lecci* v. *Cahn,* 493 F. 2d 826 (2nd Cir. 1974) where the Court observed:

> The complaint rests solely upon the theory that the statute has a chilling effect upon First Amendment rights. In United Public Workers v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L. Ed. 754 (1947), the Supreme Court, upholding the constitutionality of the Hatch Act's ban on federal employee

substantial" and if a limiting construction[18] or partial invalidation so narrows the regulation so as to eliminate apparent threat or deterrence to constitutionally protected expression, the regulation is allowed to escape a declaration of total voidness for overbreadth. *Broadrick, supra,* at 613, *Dombrowski* v. *Pfister,* 380

> participation in partisan political activities, indicated that allegations of subjective chill were not an adequate substitute for a claim of present objective harm or a threat of specific future harm. That holding was reiterated in Laird v. Tatum, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed. 2d 154 (1972). See also Fifth Ave. Peach Parade Comm. v. Gray, 480 F. 2d 326 (2nd Cir. 1973). The court below considered that Mitchell had been overruled and was not binding. In view of the recent Supreme Court holdings in United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973) and Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed 2d 830 (1973), it is quite obvious that the rumors of Mitchell's demise have been somewhat exaggerated. The "chilling effect" standing position of Dombrowski v. Pfister, 380 U.S. 479, 491-492, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965) does not survive *where the statute challenged for overbreadth regulates conduct rather than speech which is clearly the thrust of the statute here attacked.* See Broadrick v. Oklahoma, supra. We have been reminded by Mr. Justice White in Broadrick that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." (*Id.,* at 826) (emphasis added)

[18] Both the District Court and the Court of Appeals accepted a "limiting construction" of the policy, i.e., it only has reference to Calhoun Academy. The District Court stated:

> We hold that the board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools. (365 F. Supp. at 860).

Judge Roney on the Court of Appeals observed:

> I would not get to the question of the validity of the general policy unrelated to this specific case of Court ordered desegregation. This case, to me, does not have broad applications. (515 F. 2d at 750).

U.S. 479, 491 (1965); *Harrison* v. *NAACP,* 360 U.S. 167 (1959) (possibility of limiting construction). The attack upon the policy in this action fails both of these standards. First, there can be no deterrent effect on others in circumstances unlike the Petitioners. The only circumstance to which the policy can be applied is to teachers, like Petitioners, who send their children to the racially discriminatory Calhoun Academy while teaching in the public schools of Calhoun County. That this is so is self-evident by the fact that the only private school in Calhoun County is the Calhoun Academy. Secondly, when considered in the context in which it was adopted, and in light of the clear intent motivating the school board, the policy may reasonably be read to apply only to the Calhoun Academy. Indeed, the trial judge observed, ". . . the school board, the plaintiffs, and the local community understood that the regulation was adopted, and has been applied, only to public school teachers who patronize the racially discriminatory private school". (365 F. Supp. at 855)

In this regard, consideration should be directed to the reality that the school board's policy was not a meticulously drafted and printed legislative enactment, drafted by expert and experienced legislators. This Court has observed:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 578-79 (1973).

This policy, reduced to writing only by stipulation after the fact (A. 9) should be viewed in light of the circumstances which acted as its catalyst. The focus of "facial" analysis should be directed on what the regulation meant. Facial analysis is aided by the legislative history of the regulation and other available sources to explain its meaning. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973). Substance, not semantics, should govern. The "legislative history" of the policy and the circumstances in which it was adopted preclude any other view but that the regulation was a response to a particular pressing problem at a particular point in time, which the school officials felt possessed a threat to the successful implementation of the District Court's desegregation order.

In the area of school regulations, some impreciseness had been allowed, leaving to school officials the duty of acting responsibly in the application of a broad or imprecise regulation. *Murry* v. *West Baton Rouge Parish School Board,* 472 F. 2d 438 (5th Cir. 1973) *Gisner* v. *Stanford Board of Education,* 440 F. 2d 803 (2nd Cir. 1971).

Also important is the volume of state prosecutions which, of necessity, would be compelled for clarification of the meaning of the policy. *Dombrowski* expressed concern that the valid application could be separated from the invalid one only by "hammering out the structure of the statute piecemeal." *Id.,* 380 U.S. at 491. Overbreadth, doomed the statute in *Dombrowski* due to the absence "of a readily apparent construction . . . as a vehicle for rehabilitation of the statute in a single prosecution." *Id.* at 491. The major concern is that the regulation will not be rewritten in

a flood of litigants blood. The action of the Mississippi legislature in the adoption of Section 37-9-59 of the Mississippi Code assures that not a single drop will be shed in the limiting or narrowing of the school board's regulation. However, even in the absence of such legislative action, the clear line which is apparent can be established in a single litigation. Accordingly, the overbreadth attack on the policy must fail.

IV.

During the Transition Period from a Dual to a Unitary School System, a School Board, Acting Under a Court Ordered Duty to Eliminate all Vestiges of Racial Discrimination "Root and Branch" from its System, May Constitutionally and Justifiably Burden Teachers Associations Rights Involving Conduct with "Segregation" Overtones Due to Pressing Public Necessity

The Court has recognized the concept that pressing public necessity may sometimes justify the existence of the restrictions of some civil rights, given the circumstances surrounding such limitation at a given point in time, whereas three or four years later such restrictions would not be justifiable or valid. See *Korematsu* v. *United States,* 323 U.S. 214 (1944). This concept may readily be applied to the present case before the Court. Given the circumstances as they existed at the time the policy was effectuated, and the action involving the Petitioners were taken, this Court may readily find that the public necessity, when viewed in light of *Brown, Green* and *Barresi,* and the other mandates of this Court and the lower federal Courts, commanding the elimination of racial discrimination in the public schools, was a justification for the burdening of Petitioners' rights at that time. This is true even though such action may not be justifiable or needed four or five years thereafter. Since the elimination of racial

discrimination from the public schools, during the late 1960's and early 1970's, and as will be shown, constituted an overriding compelling government interest, it is reasonable to assert that during this transition period required to achieve this goal, some rights, even First Amendment rights, should give way to guarantee the accomplishment of that Fourteenth Amendment goal. In the school desegregation area, that concept is strengthened by *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (5th Cir. 1970) and the subsequent application of its standards dependent upon whether a school district had achieved unitary status or whether it was still in the transition period. *Singleton* set forth guidelines for faculty desegregation in school systems during the transition period. During this period, some white teachers, solely because of their race, lost their jobs to black teachers as a result of the *Singleton* guidelines. e.g. *Lee* v. *Macon County Board of Education,* 483 F. 2d 242 (5th Cir. 1973). However, once a school system passed through the transition period and became fully unitary, *Singleton* no longer applied. *Thompson* v. *Madison County Board of Education,* 476 F. 2d 676 (5th Cir. 1973). The key to the inquiry is whether a school district is still in the process of implementing the desegregation order of the Court or whether desegregation has already been completely achieved. Some school districts are no longer controlled by the *Singleton* criteria, having accomplished the goal of a fully unitary school system. *Picken* v. *Okolona Municipal Separate School District,* 380 F. Supp. 1036 (N.D. Miss. 1974) aff'd 527 F. 2d 358 (5th Cir. 1976).

Another case illustrating this approach is *Augustus* v. *School Board of Escambia County,* 507 F. 2d 152 (5th Cir. 1975), wherein after the District Court had

permanently enjoined the use of the nickname "Rebels" and the use of the Confederate Battle Flag as the school symbol, the Court of Appeals admonished the District Court to examine school regulations aimed as "symbolic irritation" for effectiveness in achieving the elimination of discrimination root and branch, modified the order to provide for a temporary injunction observing:

> There is an additional reason why the permanent injunction entered by the District Court must be modified. The Federal Court will relinquish jurisdiction when the remedy required by the original suit, the establishment of a unitary school system, has been fully achieved. At that time . . . any ancillary orders entered to aid the implementation of the court-ordered remedy should no longer be necessary. *Id.* at 158.

The Court went on to state that remedies of this type "should be imposed" so long as might be necessary to achieve the purpose of preventing the interference with the desegregation orders of the Court. *Id.* at 158.

This conceptual approach is perhaps the most readily justifiable guideline for the adjustment of the conflicting rights presented by this action.

V.

The School Board's Regulation and Action Thereunder Is Not a Denial of Petitioners' Right to Send Their Children to the Calhoun Academy. The Constitution Does Not Confer Upon the Petitioners the Right to Demand Reemployment in the Calhoun County Public Schools, as it Results in the Denial of Equal Protection of the Laws to the Public School Children of Calhoun County

The action of the Calhoun County school board under the November 1972 regulation, was not a denial or prohibition of Petitioners' assumed right to send their

children to the racially-discriminatory Calhoun Academy, but rather, at the most, constituted a "burdening" of such right. Accordingly, less of a state interest justification to support the action of the school authorities is required. In *Keckeisen* v. *Independent School District,* 509 F. 2d 1062 (8th Cir. 1975), cert. denied 44 U.S.L.W. 3719 (1976) the Court of Appeals upheld a regulation enacted by a school board providing that it would not employ administrators and teachers who were married to each other. Expert testimony in favor of the regulation was adduced at the trial. Plaintiffs challenged the constitutionality of the policy claiming it was an infringement of their fundamental right to marry. The Court, rejecting Plaintiff's argument, stated:

> The policy in question here does not deny the two people the right to marry; it only prohibits the employment of married couples in administrator-teacher situations. *Id.* at 1065.

Keckeisen is readily analogous to Petitioners' claims. Seeking to defeat the regulation as a denial of their right to send their children to the Calhoun Academy, Petitioners fail to discern that the action of the school board does not deny them such right, it only prohibits their employment if they do send their children to the Academy.

Petitioners *demand* employment in the public schools of Calhoun County irregardless of the school system's educational interests. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948). As applied to this case, the Constitu-

tion does not confer upon the Petitioners the right to demand reemployment in the Calhoun County public schools because of its resulting denial to the public school children of Calhoun County, the *Brown I* based Fourteenth Amendment guarantee of an equal educational opportunity free of overtones of racial inferiority. This Court distinctly observed in *Norwood* v. *Harrison,* 413 U.S. 455 (1973) that:

> Under *Brown* v. *Board of Education,* 347 U.S. 483 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. *Id.,* at 469.

Similarly, a teacher in Calhoun County who sent his child to the Calhoun Academy, under the polarized conditions existing in that county at the time the school board's policy was adopted, manifested, by such action, a belief in the desirability of segregated education not only to his students but the entire community. Such teacher was choosing sides. The Petitioners, inevitably cast in a role model to their students, openly stood forth upon a platform provided by the school board, financed by the school board and proclaimed, by such action, "I do not believe white children should go to school with you. This school is inferior. You are not good enough to go to school with my child, because you are black. You are not equal." Such a communication, whether intentional or not, cannot be allowed by a school board under the affirmative duties imposed by *Green.* District Judge McMillan, in a Supplemental

Opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 362 F. Supp. 1223 (W.D. N.C. 1973), has stated:

> It may be that some of the continuing discrimination is unintended or accidental; some of it may be the result of inertia and the instinctive habits of centuries—old duration; some Board members, no doubt, are unaware of much of it. As a constitutional matter, however, it does not seem to make much difference whether discrimination is the consciously intended result; responsible public servants, like the mythical "reasonable man" of the law, may be presumed to intend the natural and probably consequences of their actions and defaults; if conscious policies and actions produce or restore segregation, or have the effect of labeling a school as "inferior", those policies are discriminatory and must be corrected. (*Id.,* at 1237)

Since the conduct of the Petitioners communicates to public school children and the public that their belief that the public school system is inferior, such action, be it conscious or unconscious, is inconsistent with the board's duty under *Green.*

VI.

Pickering Provides No Guideline Due to the Circumstances of this Case; However, to the Extent that Pickering Infringes Upon the Affirmative Root and Branch from its Public Schools, it Should be Overruled or at Least Distinguished and Made Inapplicable During the Transition Period from a Dual to a Unitary System

Both the Petitioners and amicus curiae National Education Association labor tediously, expending considerable effort arguing that Petitioners' right to send their children to a segregated academy may be in-

fringed upon if such actions pose a "substantial threat of material interference with a legitimate school function", relying upon *Healy* v. *James,* 408 U.S. 169 (1972), *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969) and *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). None of these cases provide a proper guideline for the issues presented to this Court by this appeal. The definitive distinguishing characteristic between *Healy, Tinker* and *Pickering* and the present case is that in none of those actions was there a school board involved which was "clearly charged with the affirmative duty *to take whatever steps may be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." *McDaniel* v. *Barresi,* 402 U.S. 39, 41 (1971); *Green* v. *County School Board,* 391 U.S. 430, 437-38 (1968) *Healy, Tinker* or *Pickering* did not involve the exercise of constitutional rights entangled with desegregation overtones, nor did they involve the frustration, directly or indirectly, of outstanding Court desegregation orders. Petitioners rely upon a passage from *Healy,* that "[t]he government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those goals." Although *Healy* provides no guidelines for the present action, due to its obvious difference in circumstances with the situation involved here, it becomes obvious that first, in light of *Runyon,* the goals and aims of the Calhoun Academy are unlawful and which goals Petitioners not only knew about, but ascribed to, and secondly, not only did Petitioners display a specific intent to further these goals, but were *actively* involved in their furtherance. (See text accompanying footnotes 8 and 9, supra) *Healy, Tinker* and *Pickering* provide no standard by which to measure this action.

However, to the extent those cases might provide a guideline for this action, "the problem . . . (presented) . . . is to arrive at a balance between the interest of the teacher, as a citizen . . . and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* at 568. Under any balancing of interest test applied to the circumstances of this action, the scales must come down on the side of the school board. We first must begin with the *Brown I* recognition that ". . . education is perhaps the most important function of state and local governments." 347 U.S. at 493. Other Courts have stated that "[t]he interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty to further and protect the public school system." *Burnside* v. *Byars,* 363 F. 2d 744, 748 (5th Cir. 1966); *Freeman* v. *Flake,* 448 F. 2d 258, 261 (10th Cir. 1971), cert. denied 405 U.S. 1032 (1972). Add to this the fact that "[t]here is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground . . . [and] . . . [t]hat government interest is dominant over other constitutional interests to the extent that there is a complete and unavoidable conflict." *Green* v. *Connally,* 330 F. Supp. 1150, 1167 (D.C. 1971) (emphasis added). Since *Tinker* recognized that First Amendment rights of teachers must be applied in light of the *special* characteristic of the school environment (393 U.S. 506), and given the school board's broad affirmative duties under *Green, Barresi* and *Swann,* any balancing of Petitioners' associational rights against the board action must be viewed in the full context of the elimination of all forms of

racial discrimination, "root and branch", from the public schools of Calhoun County. Among the government interests weighing in favor of the school board are (1) the compelling interest in meaningful public education, (2) the affirmative duty of the Calhoun County public school officials to eliminate racial discrimination root and branch, (3) assuring the complete and total support, loyalty and dedication of the public school teachers in Calhoun County to the system, its duties and goals during the transition period to a unitary system, (4) eliminating a pervasive influence on the educational process of the public schools of Calhoun County, and (5) maintaining appropriate classroom effectiveness and performance of its teachers. Weighing against these government interests and in favor of Petitioners, is the *Runyon* right to send their children to an educational institution promoting the belief that racial segregation is desirable, a right, which "has never been afforded affirmative constitutional protections." *Id.*, 44 U.S.L.W. at 5039. It deductively follows, therefore, that even under *Pickering* guidelines, the regulation should prevail.

In any event, to the extent that *Pickering* infringes upon the affirmative duty of a school board to eliminate racial discrimination root and branch from its public schools, it should be overruled or at least distinguished and made inapplicable during the transition period from a dual to a unitary system. Any teachers' action or conduct, even though protected under *Pickering,* which results in the impairment of a school desegregation order, cannot, as a matter of public necessity, be accorded a "perferred constitutional status" over the Fourteenth Amendment guarantee of equal education opportunities. Public necessity and the

Fourteenth Amendment demand no less. Allowing a teacher's conduct to impede the orderly process of complete desegregation of the public schools, would seriously undermine the commitment to that goal and confront school authorities with the dilemma of how they are to carry out the mandates of the Federal Courts when those, who by their own admission are diametrically opposed to the same, are allowed to openly flaunt the Court ordered goals of the education institutions. As recognized by Mr. Justice Black in his dissent in *Tinker,* "[t]he truth is that a teacher . . . no more carries into a school a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic Church or Jewish Synagogue." 393 U.S. 521, 522. Quoting with approval from *Waugh* v. *Mississippi University,* 237 U.S. 589, Justice Black emphasized that:

> . . . membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. (393 U.S. at 522, 523).

Such are the circumstances of this case.

VII.

The Elimination of all Vestiges of Racial Discrimination from the Public Schools is an Overriding Vital Government Interest and Reasonably Permits the Burdening of Petitioners' Rights

Petitioners, relying upon *Elrod* v. *Burns,* 44 U.S. L.W. 5091 (June 28, 1976), further assert that the school board's regulation is a per se violation of their First Amendment rights because of what is termed

"guilt by association". As has been shown with respect to *Pickering* and *Tinker, Elrod* presents no directly in point precedent or guidelines for dealing with the situation which this appeal presents because of the conspicious absence of a court ordered affirmative duty involving racially discriminatory overtones. Nevertheless, under *Elrod,* if the government interest is "one of vital importance" and the benefit to be gained outweighs the incurred loss of protected rights, in appropriate circumstances, a burdening of those rights will survive constitutional challenge. Such is the case here. The benefit to be gained, the elimination of racial discrimination in public schools, outweighs the curtailment of the Petitioners' protected right to send their children to the Calhoun Academy.

Petitioners' criticism of *Adler* v. *Board of Education,* 342 U.S. 485 (1952) is misplaced. Although the "privilege-benefit" reasoning contained in *Adler* was rejected *by Keyishinan* v. *Board of Education,* 385 U.S. 589 (1967) and buried by *Elrod,* that portion of *Adler* which, as described by one Judge below, holding:

> "that persons employed or seeking employment in public schools have no right *to do so on their own terms,* that to maintain the integrity of public schools as part of an ordered society school authorities have the *right* and the *duty* to screen teachers in a relevant manner, not inconsistent with *basic* civil rights. (511 F. 2d at 749)

is not inconsistent with *Pickering's* "balancing of interest" approach and *Elrod's* "weighing" method. As long as basic civil rights are not *unreasonably* infringed for impermissible reasons (i.e. absence of vital government interest) government may burden some activ-

ities of its employees. *Elrod* recognized that "the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." 44 U.S.L.W. at 5095. Simply stated, this case presents the question: Is the elimination of all vestiges of racial discrimination from the public schools enough of a "vital government interest" to permit the burdening of the Petitioners' right to send their own children to a racially discriminatory academy in the context and environment of Calhoun County existing at the time such burden was imposed by the school board? We answer that question in the affirmative. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." *Swann* v. *Charlotte- Mecklenburg Board of Education,* 402 U.S. 1, at 13 (1970).

Although dealing with partisan political activities, *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 565 (1973) made reference to the importance that not only must government and its employees avoid the practice of favoritism, but also recognized how critical it is for its appearance to the public be avoided. The recognition of the importance of avoiding even improper government appearance should aid in the adjustment of the conflicting rights in this case. With respect to the school environment, in *Miller* v. *School District Number 167, Cook County, Illinois,* 495 F. 2d 658 (7th Cir. 1974) rehearing denied 500 F. 2d 711 (1974). Judge Stevens, now Justice Stevens, observed:

> . . . the public's reaction to an official, and a student's reaction to his teacher, is undoubtedly affected by the image he projects. *Id.,* at 667.

* * *

> Although the interest of children in associating with persons of their choice is, of course, severely limited by both their parents and the State, we should not ignore the fact that they do have a valid interest in not being compelled to associate with persons they or their parents consider objectionable. In the classroom, since their presence is compelled, they necessarily must look to the school board for protection of this interest. For this reason, it is appropriate for the school board, elected by the local community, to select the people with whom it wants the minors of the community to associate as teachers. *Id.*, at 667.

The Calhoun County Board of Education accepted the mandate of this Court in *Green* and *Barresi* at face value. They took affirmative action to eliminate a situation which was thwarting the implementation of an outstanding school desegregation order. As recognized by the District Court:

> the board was persuaded that the challenged rules was needed to eliminate racial discrimination from the public schools. Public school desegregation in Calhoun County was a controversial policy which caused a division in the community; many citizens immediately threw their support to continuing racial segregation in a private school to operate in competition with the public schools. Since white flight may present a serious obstacle to effective desegregation, a school board is empowered to adopt appropriate measures in aid of the schools under its charge. Defendants, without dispute, acted with no purpose or motive other than to strengthen local support for the public schools by requiring its teachers to give their undivided loyalty to the unitary school system and forego allegiance as patrons of schools practicing racial discrimination. 365 F. Supp. at 860.[19]

[19] Petitioners zealiously attack these findings of fact by the District Court and relying upon *Pickering* v. *Board of Education*, 391 U.S. 563, call for an independent review of the record. In *Pickering*, the review was made because the trial court had made *no* findings of fact on its own, but rather the fact finding body was the victim of the Plaintiffs' letter, i.e., the Defendant School Board. *Id.*, at 568 n. 2 No *de novo* consideration had been given the facts of the case by any Court. In *Pickering* the Court did recognize that:

> . . . even in cases where the upholding or the rejection of a constitutional claim turns on the resolution of factual questions, we . . . consistently give great, if not controlling, weight to the findings of fact of the (trial) courts. *Id.*, at 579 n. 2.

The findings of fact by the District Court comes before this Court, "well armed with . . . buckler and shield" and should not be set aside unless they are "clearly erroneous". *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364 (1947); *Horton* v. *U. S. Steel Corp.*, 286 F. 2d 210 (5th Cir. 1961); Federal Rules of Civil Procedure, Rule 52(a). Judge Roney, in expressing his views in the panel decision, expressly stated that the findings of fact of the District Court were not "clearly erroneous" and rested his affirmance upon "the findings of fact as they apply to these individual plaintiffs". 511 F. 2d at 750.

When viewed in its entire context, the action of the school board must be upheld. There can be no compromise of nor regression from, the realization of *Brown's* promise of an equal educational opportunity for all, free of racial overtones.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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